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BOOK REVIEWS

THE NATURE AND SOURCES OF THE LAW. By John Chipman Gray. New York: Columbia University Press.

This work, as its name indicates, is divided into two parts. Part I deals with the nature of the Law, Part II with the sources of the Law.

There are, says the author, three ways of approaching the Law. The historical, the systematic or analytic, and the deontological or ethical.

It is his purpose to follow the systematic method and to call attention to the analysis and relations of some fundamental legal ideas, rather than to tell their history or prophesy their further development.

Having devoted a chapter to the subject of legal rights and duties, another to legal persons, and a third to the state, the author proceeds to an analysis of the Law of a state, which he defines as "the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties." Law, he says, is not a command of the sovereign, as Austin would have us believe, nor is the foundation of law to be found in the common consciousness of the people, where Savigny found it. Nor yet is it true that the Judges merely state what has been pre-existent as Law. Again it is inaccurate to say that the Judges discover the Law as a scientist discovers laws of nature, and that a Judge may make a mistake just as Newton did, for the "difference between the Judges and Sir Isaac is that a mistake by Sir Isaac in calculating the orbit of the earth would not send it spinning round the sun with an increased velocity; his answer to the problem would be simply wrong: while if the Judges, in investigating the reasons on which the Law should be based, come to a wrong result, and give forth a rule which is discordant with the eternal verities, it is none the less Law."

With this as his conception of the Law, the author easily arrives at the conclusion that international law is not Law in the proper sense when used to designate the rules applied by the Judges of any sovereign state. Such rules are part of the law of that state, but rules applied by a court established by the nations as a result of the organization of such nations would be Law in the proper sense.

Before passing to the second part of the book a word must be said of the chapter on jurisprudence. Jurisprudence, he says, is the science of law. There are three kinds of jurisprudence, particular jurisprudence, comparative jurisprudence, and general jurisprudence. Particular jurisprudence considers the Law of a particular people. Comparative jurisprudence is the comparison of the Laws of two or more peoples, and general jurisprudence is the comparison of all the legal systems of the world. As there are many legal systems which are practically unknown to us, general jurisprudence as a science based on observation does not yet exist.

It might be supposed that from his theory of the Law Professor Gray would deny that the deontological element enters into the science of jurisprudence. But on the contrary, he tells us that particular

jurisprudence is not limited in its subject matter to the rules which have been actually applied by the courts, but it considers also what the law should be in cases where no rule exists. As soon as a rule is declared on a given point, the question of what the law on that subject should be ceases to be a subject of jurisprudence and becomes a question for the science of legislation. The same principle is applicable to comparative jurisprudence. If we are comparing two legal systems, the question of what the Law ought to be on any given point is proper unless the matter is definitely settled in both jurisdictions; then the question of what the Law ought to be is no longer appropriate.

Having defined the Law as the rules laid down by the courts the author proceeds to consider the sources of the Law.

The sources of the Law are statutes, judicial precedents, the opinions of experts, custom, morality and equity.

Statutes are merely sources and not the Law itself. In other words, statutes are not rules applied by the courts, but a source from which the courts get their rules. The reason for this position is that the meaning of a statute depends on interpretation, and it is with the meaning declared by the courts, and with that meaning alone, that they are imposed on the community as Law.

The position that judicial precedents are sources of the Law leads the author to the refutation of the theory that precedents are merely evidence of what the Law is. Does such a theory agree with the facts? he asks. What was the Law as to executory devises before the decision in *Pells* v. *Brown*? The advocates of the theory that a decision is only evidence of the Law would say the validity of executory devises existed by custom prior to the decision. "But since custom is what is generally practiced in a community, and believed by the community generally to be a proper practice, it "is a baseless dream, invented only to avoid the necessity of saying that Judges make the Law to hold that (prior to the decisions) there was a custom that future contingent interests were indestructible."

Custom is another of the sources of the Law. It is not the only source, as the late Mr. James C. Carter would have us believe, but is only one of the sources. Its chief function is in the sphere of interpretation of contracts, and in negligence cases where the test is whether a certain person has acted as a reasonable man.

In the absence of statutes, judicial precedent, opinions of experts, and custom, the source from which the courts draw their rules is morality and equity. For it is generally conceded that a court is never authorized to refuse to pass upon a case, because there is no person, book, or custom to tell it how to decide it.

The whole book, it will be found, is hinged on this idea: that the Law of a state is composed of the rules which the courts lay down for the determination of legal rights and duties. To Austin, he says, we are indebted for clearly pointing out that the Law is something that actually exists, not something that ought to exist. Austin, however, found in statutes of the state the typical Law, and his aim was to bring non-statute Law within this type; this he accomplished by the fiction that what the sovereign permits he commands. Professor Gray, on the other hand, says that statutes are merely a source of the Law, until interpreted by the courts.

In the chapters on the Law, Judicial Precedents and Custom, Professor Gray's views come in conflict with the theory of Law so ably set forth by the late Mr. James C. Carter ("Law: Its Origin, Growth and Function").

Mr. Carter's book, as Professor Gray himself points out, appears to be the result of his opposition to the adoption of Mr. David Dudley Field's "Civil Code in New York." His analysis was probably in the first instance to show that the Law is not a set of arbitrary, inflexible rules, but that the Law differs with every generation and that, therefore, the idea of a Code of the substantive Laws is fundamentally wrong.

Carter's conception of substantive Law was expressed in terms of custom. A new set of circumstances arising would be decided by broad rules of conduct.

Professor Gray, on the other hand, would say that those cases where no universal conduct or practice (and no statute, judicial precedent or opinion of experts) exists are decided on principles of morality and equity. To call these principles custom, he would say, is inaccurate because custom is conduct or practice. The rule allowing three days' grace on bills of exchange was based originally on custom, but the rule in *Shelley's Case* was based on morality, which in this case would be public policy.

It must be admitted that, however great may be our appreciation of Mr. Carter's view, Professor Gray has presented us with a more accurate and satisfying analysis.

This little book, like everything else from Professor Gray's pen, is a carefully written, clearly expressed account of the result of much searching thought on the subjects considered.

The occasion of the publication of his views was the Carpentier lectures at Columbia University in 1908.

PRACTICAL SUGGESTIONS FOR DRAWING WILLS AND THE SETTLEMENT OF ESTATES IN PENNSYLVANIA. By John Marshall Gest of the Philadelphia Bar.

This book presents for consideration a concise and accurate compendium of the practical as well as legal questions encountered in that branch of a lawyer's work indicated by the title.

The section on Drawing of Wills was published in THE AMERICAN LAW REGISTER for November, 1907, and the lectures upon which the book is based were delivered to the students of the Law Department of the University of Pennsylvania.

The author shows not only great research among the authorities, and decisions relative to his subjects, but has instilled a quaint current of humor into his work that makes the volume not only valuable to the active practitioner, but readable even to the layman—a quality possessed by few legal treatises.

If technical books could all be written in the breezy style which characterizes Mr. Gest's lectures the student would smilingly burn the midnight oil until he had read and digested the last syllable. An easy task for humor aids digestion.

The wide field of first drafting a will in accordance with a testator's intentions and then accomplishing the execution thereof under the law is fully traversed by the author and the invaluable suggestions put forth show the result of study along practical lines together with close observation of human nature and a no mean ability in communicating this knowledge in an attractive form.